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Introduction

A Story Retold

Brown v. Board of Education (1954) is widely recognized as one of the Supreme Court's most important decisions in the twentieth century, second perhaps only to *Marbury v. Madison* (1803). Justice Robert H. Jackson is generally considered one of the Court's most gifted writers. Much has been written about *Brown,* of course, but comparatively little on Jackson or his unpublished opinion in *Brown*.

The story of *Brown* has been told and retold in many ways, from different perspectives by historians, legal scholars, political scientists, and others. Some explain *Brown* in terms of historical currents and struggles,[1] the influence of World War II and the cold war on the justices,[2] and the role of social science in reconsidering the "separate but equal" doctrine in education.[3] Still others focus on the impact and problems of implementing *Brown*'s mandate.[4] *Brown* for some epitomizes the "hollow hope" of looking to the Court to forge social change[5] and a failure to address fundamental racial inequalities.[6] In hindsight, legal scholars have speculated about what the justices should have said in *Brown*.[7] However, insiders who participated in arguing what became a seminal ruling have offered their historical reflections.[8] So too have some of the justices who decided *Brown* left recollections in their correspondence, interviews, and memoirs.[9] Likewise, former law clerks, who witnessed aspects of the justices' decision making, have weighed in.[10]

Brown is placed in the canon of constitutional law by legal scholars on both the left and the right.[11] In a well-known article, Justice Felix Frankfurter's former law clerk, Alexander Bickel, however, argued that the "original intent" of the drafters of the Fourteenth Amendment provided no basis for the ruling, yet concluded the decision was morally right.[12] By contrast, Bickel's Yale Law School colleague and leading champion of a jurisprudence of "original intentions," ill-fated 1987 Supreme Court nominee Judge Robert H. Bork, condemned the Court for embracing moral philosophy and asserting its "virtually invulnerable" power over democratic self-governance. *Brown,* in his and other conservatives' view, was the height of judicial overreach and lack of "self-restraint."[13] Subsequent scholars have nonetheless tried to square *Brown* with the "original public understanding" of the Fourteenth Amendment,[14] though not without justified criticism of their historical revisionism.[15]

Much has also been written about the justices' decision making in *Brown,*

and their unanimity in particular.[16] Some scholars have speculated about how *Brown* might have been decided if Chief Justice Fred Vinson (1946–1953) had not died in the summer of 1953.[17] Even more praise Chief Justice Earl Warren (1953–1969) for leadership in obtaining a unanimous decision,[18] although he downplayed his role in that regard.[19] Numerous others consider *Brown* in light of the New Deal justices' antagonism over broader jurisprudential views,[20] along with how their deliberations may be explained from various other perspectives—judicial attitudes and alliances, concerns about the Court's institutional prestige, and strategic political considerations.[21]

Most interpretations and reinterpretations since Richard Kluger's definitive book, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (1975),[22] have (at least in part) turned on the availability of the private papers of justices who participated in deciding *Brown,* oral histories, and the papers of their law clerks and others. Besides interviews with former justices and law clerks, Kluger had access to the papers of Justices Harold Burton, Hugo L. Black, and Felix Frankfurter, as well as some of Jackson's papers. Later the papers of Chief Justices Fred Vinson and Earl Warren, along with those of Justices William O. Douglas, Stanley Reed, Sherman Minton, and Tom C. Clark, as well as their law clerks, became available at the Library of Congress, Harvard Law School, the University of Kentucky, and the University of Texas, as well as at presidential libraries. Kluger's own notes on interviews conducted for *Simple Justice* later also became available at Yale University. Subsequently, more oral histories of justices, former clerks, and others were made available at Columbia University, the University of Virginia, Princeton University, the University of Michigan, the Hoover Institution Archives, and elsewhere. All of these and other sources have enriched the story of *Brown* but also at times have led to conflicting historical accounts.

By comparison, Jackson received relatively less attention—though, of course, virtually all works dealing with *Brown* discuss him. There is only one major biography,[23] a couple of collections of reflections and his opinions,[24] and a much larger number of articles. Kluger, among others, drew attention to Jackson's unpublished opinion. It has remained a subject of speculation about its significance (sometimes mistakenly taken as a dissenting opinion), much excerpted[25] and analyzed, particularly in connection with the controversy over claims made by one of Jackson's clerks, William H. Rehnquist, during his 1971 and 1986 Senate confirmation hearings on his appointment to the Court and then as chief justice. That memo argued for upholding the "separate but equal" doctrine, which Rehnquist subsequently claimed reflected Justice Jackson's, and not his own, position.[26]

The story of *Brown* that I tell here is from the perspective of Jackson and

his unpublished opinion, and as such, it is about both the decision and the justice. More importantly, it is about constitutional interpretation as well as the intersection of law and politics. It deals with the mind of a justice within the context of a Court deciding a seminal case as he wrestles with arguments over "original intent" versus a "living Constitution," the role of the Court, and social change and justice in American political life.

By no means was Jackson alone in withholding draft opinions. All justices have undoubtedly done so.[27] Indeed, his successor, Justice John Marshall Harlan, had his unpublished opinions bound and kept them in his chambers for reference.[28] Jackson's papers include a considerable number of suppressed drafts.[29] They register his struggles with competing arguments over constitutional interpretation and the role of the Court. They also reflect not only conversations with himself but also his thinking about fundamental issues of constitutional interpretation, law, and politics that still remain debated.

Jackson's unpublished opinion went through six drafts, changing in length, structure, and substantive focus. The length grew from fourteen to twenty-three pages as material was deleted, added, and elaborated. The first couple of drafts have only four sections, whereas the third has seven, and the fourth and fifth each have five. The final draft's four sections incorporate and reorganize material from earlier versions. The titles of sections also reflect his evolving thinking. The title of section 2, for instance, changes from "Constitutional Basis" in the first draft to "Basis for Existing Law for Decision" in the third and "Existing Law Does Not Condemn Segregation" in the fourth and fifth; in the final draft, it becomes "Does Existing Law Condemn Segregation?" In addition, from the first to the last, the tone and analysis grow less pessimistic and more reconciled to the result. Throughout, he remained anxious about the ruling and the problems of compliance and implementation—less so than Frankfurter or Reed, but more so than Black or Douglas.

Moreover, Jackson revised drafts at critical times. The first was drafted on December 7, 1953, two days before the second round of oral arguments in *Brown*. Written without the assistance of law clerks, it reaches conclusions contrary to some of their later recommendations and subsequent recollections. Most significantly it makes clear that for him the decision was a foregone conclusion. "The Constitution," Jackson stated, "this morning forbids" segregation that had previously been constitutionally sanctioned. Although finding a "judicial basis" for the ruling "dubious," he was confident that segregated schools could no longer stand. Conceding that constitutional interpretation is political, he stood apart from some other justices who denied or refused to acknowledge that fact. What continually and deeply troubled him (and others on the bench) was not only the justification for applying

the guarantees of the Fourteenth Amendment but also how much flexibility and guidance should be given for achieving desegregation. The outcome was nevertheless certain, even before conference discussions with Chief Justice Earl Warren presiding (as a recess appointee). That does not mean the decision would have been unanimous had Chief Justice Vinson not died before a final vote was taken, only that a solid majority—including Jackson—initially supported the eventual result.

In January 1954, after the second round of oral arguments, the draft was revised twice more. The fourth draft, written on February 15, 1954, notably again refers to "today's decision," even though the decision in *Brown* would not come down until May 17, 1954. The fifth draft, written on March 1, 1954, the same day the Senate unanimously confirmed Warren as chief justice, was followed two weeks later by the sixth and last revision.

This retelling of the story of *Brown* weaves together judicial biography, legal history, judicial politics, and debates over constitutional interpretation, along with the role of the Court in American politics. In Part I, Chapter 1 discusses Jackson's background, rise to the Court, judicial philosophy, and advocacy of judicial self-restraint. Chapter 2 examines his relations with other justices, their backgrounds and positions, and their relative contributions to reaching a unanimous decision in *Brown*. Chapter 3 deals with Jackson in chambers and relationships with law clerks. More specifically, extensive discussion is devoted to the controversy over Rehnquist's memo on *Brown* and Jackson's decision to withhold publication of the draft opinion. Chapter 4 analyzes Jackson's drafts and his coming to terms with problems of constitutional interpretation in justifying *Brown*. Finally, Chapter 5 concludes with a reconsideration of some criticisms and misunderstandings of Jackson's unpublished opinion and offers a final assessment.

Part II includes the final draft of Jackson's unpublished opinion, followed by the Warren Court's opinions in *Brown v. Board of Education of Topeka, Kansas,* and *Bolling v. Sharpe* for comparison, as well as a timeline of developments and decision making leading to the Court's landmark ruling.